

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No 68 of 1998

in

COMPANY APPLICATIONNO 207 of 1994

with

O.J.APPEAL No 70 of 1998

WITH

O.J. APPEAL NO 48 OF 1998

WITH

O.J. APPEAL NO. 49 OF 1998

WITH

O.J. APPEAL NO. 50 OF 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?

4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge? : NO

BANK OF INDIA, AHMEDABAD CORPORATE BANKING BRANCH

Versus

NARENDRAKUMAR CHINUBHAI SHETH LEGAL HEIRS OF DECEASED

Appearance:

1. O.J.APPEAL No. 68 of 1998

MR JT TRIVEDI for Petitioner
MR RM DESAI for Respondent No. 3
NOTICE SERVED for Respondent No. 4

2. O.J.APPEALNo 70 of 1998

MR JT TRIVEDI for Petitioner
MR D S VASAVADA for Respondent No. 4

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE K.M.MEHTA

Date of decision: 16/12/1999

ORAL JUDGEMENT (Per Patel, J.)

O.J. Appeal No. 68/98 and 70/98 arise out of an order passed by learned Company Judge in Company Application No. 268 of 1994 in Company Petition No. 745/93, which is decided on 3rd August 1998.

2. Appeal No. 68 arise out of the order passed by the learned Company Judge in Company Application No. 207/94 in Company Petition No. 160/89 which is decided on 3rd August 1998. Company Application No. 207/94 is disposed of for the reasons given in Company Application No.268/94 in Company Petition No. 160/89. Therefore, we have to consider the decision in Company Application No. 268/94.

OJ Appeal No.58/98

3. This appeal arises out of the judgment and order, dated 3.8.98 passed by the learned Company Judge in Co.Application No.207/94. The learned Company Judge in his judgment observed as under:

"The application deserves to be allowed to the extent it seeks restraint against the transfer of land in question independently and not as a part of a going concern. The Official Liquidator is so restrained. As noticed above, the applicant himself has not pressed, and in my opinion, rightly so keeping in view the ratio laid down in N.R.Bavna's case (supra) the prayer for immediate return of possession as the premises are occupied for company's purposes by Official Liquidator. This will not preclude the applicant to take recourse to such remedies as are available to him including moving a fresh application in this regard for recovering the possession of the

property in question from the Official Liquidator when the occasion arises in future.

However, the Official Liquidator shall continue to pay the annual rent as per agreement as and when becomes due and shall pay such of balance of arrears, if any, with effect from the date of winding up to date. Any amount if it is due for period prior to date of winding up will be subject to be proved as debt before the Official Liquidator in accordance with Company's Court Rules."

4. Before the Learned Company Judge the original applicant had taken out judges summons as under:

"A" That the official liquidator be directed to pay the rent including the arrears of rent due and payable to the applicants for giving the land bearing S.Nos.372, 374, 373, 376 and 377 on permanent lease to the Mill's company by lease agreement executed on 17.1.31.

"B" That the official liquidator be further directed to handover the possession of the said land to the applicants as the same was not required for the purpose of running the Mills Application.

"C" That during the final disposal of this application the Official Liquidator be restrained from disposing of the above land pursuant to his advertisement appeared in Sandesh, dt.14.8.94

4.1 In support of the said prayers, the applicant stated that so far as the land bearing S.No.379 is concerned it comprises of land and building situated at Mehsana. There were other properties of the Company-Navjivan Mills Ltd. This court has passed an order in March 1998 and applicant has moved the application for directing the Official Liquidator to handover the possession of land bearing No.379 situated at Mehsana. No other details were given in the application.

OJ Appeal No.48/98

5. This appeal arises out of the order dated 7.10.94 of the learned Company Judge in which the learned Company Judge has observed that the leased property being the

properties having saleable interest have vested in the Official Liquidator and therefore the prayers of the applicant to handover the vacant possession of the land in question on which Amruta Mills Ltd. is situated can not be acceded to. Said Amruta Mills is in liquidation and as per the order of this court, dated 22.9.91 the Official Liquidator has taken over the charge of the said property. In the said application company has also filed application No.47/93 and has only mentioned about the leasehold right of the said company but details about whether the property is mortgaged with the petitioners are not given.

6. In the State of Gujarat, by and large, lands are taken on lease for a period of 99 years, or 999 years for a permanent lease. In these appeals, reading one of the Company Applications, copy of which is placed on record, it transpires that Kanubhai claimed to be the owner of land bearing Survey No. 379 situated at Kalol, District Mehsana. The applicant of the said Company Application has stated that he being the heir of deceased Kumbhar Mafatlal Shankarlal and deceased Hiralal Shankarlal has acquired the rights over the property.

7. It is required to be noted that all heirs are not joined as petitioners. No statement is made on oath that except the applicant of Company Application No. 268 of 1994, there were no other heirs. Secured creditors having mortgage over the lease hold interest of the Company, the Court has to consider their rights. What is the effect of mortgage of the leasehold right is an aspect which is required to be taken into consideration. In O.J. Appeal No. 68 of 1998, pages 45, 46, 47 and 48 indicate as to who were/are the heir/s. So far as that appeal is concerned, Narendra Kumar Chinubhai Shah and Hemantkumar Rajnikant preferred applications. Other heirs are not joined as applicant or opponents. There is no positive statement that except these two, there are no other heirs. As a matter of fact, from the notice it appears that there are other heirs. Therefore, in a matter like this, it would be more appropriate to have the affidavit from the applicant clearly stating that except the applicant/s, no other heir/s are there having any right whatsoever over the property in question. They should have been brought on record as applicant/s or if they were not so joined, they ought to have been joined as opponents. It would be more appropriate if the Court is satisfied to direct the Registry to publish an advertisement at the cost of the applicants so as to make other heirs aware about the litigation.

8. Issue is of mortgage and once dispute is raised the same is required to be decided. We find it difficult to go into the question in the absence of necessary material and facts and finding on the question. Mr. Soparkar, learned counsel drew our attention to certain grounds. He submitted that what are the rights of secured creditors who choose to remain outside the winding up, is an important aspect. According to him, security of the mortgage is land and building etc. of the Company in liquidation. Therefore, it is absolutely necessary to have the finding on this aspect. He submitted that the charge in favour of the appellant was created as a result of the mortgage in favour of the appellant. So far as documents of charge is concerned, there was registration of the charge with the Registrar of Companies in consonance with the provisions contained in the Registration Act. He further submitted that the landlord never objected to the registration of the charge. He further submitted that the leasehold rights are transferable and there was no prohibition.

9. It appears that there was question of interpretation of documents. It also appears that proper facts were not placed before the Court.

10. This Court could have called upon the parties to lead additional evidence. It was submitted that necessary material ought to have been placed before the learned Company Judge. As a matter of fact, learned advocates appearing for the parties submitted before us that for want of proper findings, they would not be able to assist the Court and requested that the matter may be remanded so that all the submissions can be considered effectively by the learned Company Judge.

11. After going through the order, we are of the view that the matter should be remanded for giving further opportunity of hearing the matter afresh.

12. There are two contradictory views; earlier order was not brought to the notice of the Court while hearing the subsequent matter. Learned Company Judge ought to have decided the matter taking all the pros and cons into consideration. However, we do not express any opinion in this regard.

13. So far as appeals No. 48 to 50 of 1998 are concerned, there is a statement to the effect that the heirs prosecuting this appeal are the only heirs. However, Mr. Desai submitted that apart from the heirs, there are other parties who have a right over the

property by virtue of mortgage. Before us, contention is raised that the immovable properties are mortgaged to financial institutions like IFCI, IDBI, ICCI IRBI and other Banks and the properties are charged to them as security for repayment of dues. From the order it appears that this aspect is also not considered in the order. We are told that there are several applications pending before the learned Company Judge raising similar issues. On account of winding up of several units, applications are preferred and are pending before the learned Company Judge. The question which is raised before us goes to the root of the matter but unfortunately attention of the learned Single Judge was not drawn on certain relevant aspects by the advocates appearing in the matter.

14. For the reasons aforesaid, we remand all these matters to the learned Company Judge for deciding the matter afresh. As a result, the orders passed by the learned Company Judge are set aside. It goes without saying that before the learned Company Judge, the learned advocates are permitted to argue all the grounds raised before us and the same are kept open. Though we have set aside both the judgments, we have not expressed any opinion about the legality and validity of the views of the learned Company Judge. As there was no sufficient material to adjudicate the issues, we have remanded the matters and hence it would be for the learned Company Judge to decide the matter afresh on the material that may be placed before the Court.

Appeals allowed accordingly.

csm./ -----